

1 HAROLD P. SMITH, ESQ. (SBN: 126985)

psmith@dhillonsmith.com

2 KRISTA L. SHOQUIST, ESQ. (SBN: 264600)

kshoquist@dhillonsmith.com

3 DHILLON & SMITH LLP

177 Post Street, Suite 700

4 San Francisco, California 94108

Telephone: (415) 433-1700

5 Facsimile: (415) 520-6593

6 Attorneys for Plaintiff

7 Harmeet K. Dhillon

8 **UNITED STATES DISTRICT COURT**

9 **NORTHERN DISTRICT OF CALIFORNIA**

10
11 HARMEET K. DHILLON,

12 Plaintiff,

13 v.

14 DOE 1, *et al.*,

15 Defendants.

Case No. 13-CV-01465 SI

**PLAINTIFF'S OPPOSITION TO
DEFENDANT DOE 1's MOTION FOR
JUDGMENT ON THE PLEADINGS
PURSUANT TO FRCP 12(c) OR FOR
SUMMARY JUDGMENT**

Hearing Date: February 28, 2014

Hearing Time: 9:00 a.m.

Courtroom 10, 19th Floor

Hon. Susan Illston

TABLE OF CONTENTS

I. INTRODUCTION	1
II. FACTUAL AND PROCEDURAL BACKGROUND	2
III. THE FIRST AMENDMENT DOES NOT PROVIDE A LICENSE FOR COPYRIGHT INFRINGEMENT.....	5
IV. MS. DHILLON HAS MADE A PRIMA FACIE CLAIM OF COPYRIGHT INFRINGEMENT	6
V. JUDGMENT ON THE PLEADINGS UNDER FRCP 12(c) AND SUMMARY JUDGMENT UNDER FRCP 56 ARE INAPPROPRIATE BECAUSE THE OPERATIVE FACTS PERTAINING TO DOE 1’S AFFIRMATIVE DEFENSE OF FAIR USE ARE DISPUTED	7
A. Judgment on the Pleadings Under FRCP 12(c) is Unwarranted.....	7
B. Summary Judgment Under FRCP 56 is Unwarranted	8
VI. DOE 1 CANNOT SHOW, AS A MATTER OF LAW, THAT THE FAIR USE FACTORS WEIGH IN FAVOR OF GRANTING JUDGMENT ON THE PLEADINGS	10
A. Purpose and Character of the Use.....	10
1. Commercial Character of the Use	10
2. Transformative Character of the Use	15
B. The Nature of the Copyrighted Work.....	18
C. The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole	19
D. The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work.....	20
VII. AWARDING ATTORNEYS’ FEES OR COSTS TO DOE 1 WOULD BE WHOLLY UNWARRANTED	22
VIII. CONCLUSION	25

VIII. EVIDENTIARY OBJECTIONS TO THE DECLARATION OF RICK CIGEL..... 25

TABLE OF AUTHORITIES

Cases

<i>AF Holdings LLC v. Navasca</i> , 2013 WL3815677 (N.D. Cal. 2013)	24
<i>America Online, Inc. v. Anonymous Publicly Traded Co.</i> , 261 Va. 350 S.E.2d 377 (2001)	5
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	9
<i>Anonymous Online Speakers</i> , 661 F.3d 1168 (9 th Cir. 2011)	5
<i>Bibbero Systems, Inc. v. Colwell Systems, Inc.</i> , 893 F.2d 1104 (9th Cir. 1990).....	23
<i>British Airways Bd. v. Boeing Co.</i> , 585 F.2d 946 (9th Cir.1978)	11
<i>Burnett v. Twentieth Century Fox Film Corp.</i> , 491 F.Supp.2d 962 (C.D.Cal.2007).....	8
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994)	6, 10, 16
<i>Columbia Ins.Co. v. Seescandy.com</i> , 185 F.R.D. 573 (N.D. Cal. 1999)	5
<i>Dash v. Mayweather</i> , 731 F.3d 303 (4 th Cir. 2013)	20, 21
<i>Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.</i> , 109 F.3d 1394 (9th Cir. 1997).....	7, 21
<i>Fogerty v. Fantasy, Inc.</i> 510 U.S. 517 (1994)	23, 24
<i>Fox Broad. Co., Inc. v. Dish Network L.L.C.</i> , 723 F.3d 1067 (9th Cir. 2013)	7
<i>Harper & Row Publishers, Inc. v. Nation Enterprises</i> , 471 U.S. 539 (1985)	6, 10, 18, 19
<i>Hustler Magazine Inc. v. Moral Majority Inc.</i> 796 F.2d 1148 (9th Cir. 1986).....	7
<i>Jartech, Inc. v. Clancy</i> , 666 F.2d 403 (9th Cir. 1982)	23
<i>Kelly v. Arriba Soft Corp.</i> , 336 F.3d 811 (9th Cir. 2003)	20
<i>Latimer v. Roaring Toyz, Inc.</i> , 601 F.3d 1224 (11 th Cir. 2010)	6
<i>Leadsinger, Inc. v. BMG Music Pub.</i> 512 F.3d 522 (9th Cir. 2008).....	7, 10
<i>Lefkoe v. Jos A. Bank Clothiers, Inc.</i> , 577 F.3d 240 (4 th Cir. 2009).....	5
<i>Los Angeles News Serv. v. Tullo</i> , 973 F.2d 791 (9th Cir.1992).....	18, 22
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986).....	9
<i>Monge v. Maya Magazines, Inc.</i> , 688 F.3d 1164 (9th Cir. 2012).....	7, 16, 17, 18
<i>Nissan Fire Ltd. v. Fritz Cos., Inc.</i> , 210 F.3d 1099 (9th Cir.2000)	8

1	<i>Nunez v. Caribbean Intern. News Corp.</i> , 235 F.3d 18 (1 st Cir. 2000)	18, 19
2	<i>Perfect 10, Inc. v. Amazon.com, Inc.</i> , 508 F.3d 1146 (9th Cir. 2007)	7
3	<i>Ringgold v. Black Entm't Television, Inc.</i> , 126 F.3d 70 (2d Cir.1997).....	16
4	<i>Roach Studios, Inc. v. Richard Feiner & Co., Inc.</i> , 896 F.2d 1542 (9th Cir.1989)	7
5	<i>Roth v. Pritikin</i> 787 F.2d 54 (2d Cir. 1986)	23
6	<i>Savage v. Council On American-Islamic Relations, Inc.</i> , 2008 WL 2951281 (N.D. Cal. 2008)....	8
7	<i>Sedgwick Claims Mgmt. Servs., Inc. v. Delsman</i> , 2009 WL 2157573 (N.D. Cal. 2009).....	17
8	<i>Seltzer v. Green Day, Inc.</i> , 725 F.3d 1170 (9th Cir. 2013)	16, 23, 24, 25
9	<i>Shepard v. Miler</i> , 2010 WL 5205108 (E.D. Cal. 2010).....	8
10	<i>Sofa Entm't, Inc. v. Dodger Prods.</i> , 709 F.3d 1273 (9 th Cir. 2013).....	23
11	<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984)	10, 11
12	<i>Sony Music Entertainment Inc. v. Does 1-40</i> , 326 F.Supp.2d 556 (S.D.N.Y. 2004).....	5, 6
13	<i>Southern California Gas Co. v. City of Santa Ana</i> , 336 F.3d 885 (9th Cir.2003)	8, 12
14	<i>Subpoena Duces Tecum to America Online, Inc.</i> , WL 1210372 (Va.Cir.Ct. Jan. 31, 2000).....	5
15	<i>T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n</i> , 809 F.2d 626 (9th Cir.1987).....	9
16	<i>Triton Energy Corp. v. Square D. Co.</i> , 68 F.3d 1216 (9 th Cir. 1995).....	9
17	<i>U.S. v. Hinkson</i> , 585 F.3d 1247 (9 th Cir. 2009).	25
18	<i>Wall Data Inc. v. Los Angeles County Sheriff's Dept.</i> , 447 F.3d 769 (9 th Cir. 2006).....	17
19	Statutes	
20	17 U.S.C. §107.....	6, 10, 18, 20
21	Fed. R. Civ. P. 56.....	8, 9, 11
22	Fed. Rules Evid., Rule 602	25
23	Fed.R.Civ.P. 12(c)	7
24		
25		
26		

I. INTRODUCTION

Plaintiff Harmeet K. Dhillon submits this Opposition to Defendant Doe 1's Motion for Judgment on the Pleadings pursuant to FRCP 12(c) or for Summary Judgment (the "Motion").

Doe 1 does not and cannot contest that he made unauthorized use of materials owned and copyrighted by Ms. Dhillon. Nor does Doe 1 claim that the First Amendment constitutes a license for copyright infringement (it does not). Instead, Doe 1 relies on vindictive rhetoric, a skewed mischaracterization of the facts, and omission of critical points in order to paint his property theft as "fair" and Ms. Dhillon's diligent efforts to enforce her intellectual property rights as somehow "sinister." As but one example, Doe 1 chooses to ignore the inconvenient fact that Ms. Dhillon's Complaint seeks not only monetary damages, but also the permanent injunctive relief to which she is entitled under the copyright laws and which is essential to ensure that Defendants cease from continuing their infringement of, or encouraging others to infringe upon, Ms. Dhillon's intellectual property. In reality, Doe 1's Motion is merely a smokescreen for his true purpose—to secure his ability continually to violate Plaintiff's copyrights while hiding behind an illusory shield of purported First Amendment rights.

As Doe 1 cannot deny that he (and possibly others affiliated with him) made unauthorized use of copyrighted work owned by Ms. Dhillon, Doe 1's legal argument exclusively relies on the concept of fair use, an affirmative defense to copyright infringement. However, despite having had *three distinct opportunities in two separate courts* to present the predicate facts to demonstrate fair use, Doe 1 utterly fails to meet his burden at the summary judgment stage, which requires him to eliminate any dispute about each material fact relevant to a fair use analysis. Doe 1's failure to set forth *any admissible evidence* regarding fair use, coupled with Ms. Dhillon's evidence proving that hotly contested material issues exist, preclude granting this Motion.

First, Doe 1 submits no evidence whatsoever establishing that his infringing conduct has not resulted in any commercial benefit to either himself, the blog at issue, or others involved

1 with the contested posting. This material omission is particularly telling in light of the number
 2 of chances Doe 1 has had to submit this evidence. Nor can Doe 1 dispute that he used the
 3 copyrighted work for the exact same purpose for which it was created – to identify Ms. Dhillon
 4 in connection with political endeavors.

5 Second, Ms. Dhillon submits evidence establishing the creative nature of the
 6 copyrighted work and refuting Doe 1’s misrepresentation that Ms. Dhillon has somehow made
 7 the work available to the “general public” – an unfounded lie that is disproven by Ms. Dhillon’s
 8 own testimony under oath regarding the selective authorization she has personally granted in the
 9 past. Third, to the extent that Doe 1 copied only as much of the photo as was necessary – all of
 10 it – this factor is neutral and does not weigh towards a finding of fair use. Finally, as Doe 1
 11 presents nothing more than unsupported, unqualified conclusions that his misconduct has had
 12 no likely effect on the market for or value of the copyrighted work, and in light of Ms. Dhillon’s
 13 evidence to the contrary, the fourth factor weighs against a finding of fair use.

14 Ms. Dhillon has stated a prima facie case of copyright infringement, and the balance of
 15 factors weighs against a finding of fair use. Accordingly, the Motion must be denied, and
 16 granting attorneys’ fees to Doe 1 would be erroneous.

17 **II. FACTUAL AND PROCEDURAL BACKGROUND**

18 Notwithstanding the bluster and obfuscation permeating Doe 1’s “factual” recital, the
 19 relevant facts are simple and straightforward. Plaintiff Harmeet K. Dhillon is a San Francisco-
 20 based attorney and active volunteer participant in California politics. Complaint, ¶¶ 8-9. The
 21 work at issue is a headshot photograph that Ms. Dhillon commissioned from a paid, professional
 22 campaign photographer in 2008, for the purpose of identifying herself in connection with her
 23 candidacy for Member of the State Assembly, District 13 (the “Headshot Photo”). *Id.*, ¶¶ 11-12;
 24 Declaration of Harmeet K. Dhillon In Support of Opposition to Motion (“Dhillon Decl.”), ¶2.
 25 The Headshot Photograph and its copyright are solely owned by Ms. Dhillon, and have been
 26 since they came into existence. *Id.*, ¶3. The Headshot Photograph is registered with the U.S.

Copyright Office. Declaration of Harmeet K. Dhillon In Support of Opposition to Motion (“Dhillon Decl.”), ¶3; Declaration of Krista L. Shoquist In Support of Opposition to Motion (“Shoquist Decl.”), Ex. A.

Beginning in 2008, Ms. Dhillon used the Headshot Photograph for the purpose of identifying herself, including in connection with her political and business activities. Complaint, ¶4; Dhillon Decl., ¶4. Since 2008 and until Doe 1’s infringement, individuals and entities have approached Ms. Dhillon, seeking her permission to use the Headshot Photograph, and Ms. Dhillon has granted permission to a select, restricted handful of people. Dhillon Decl., ¶¶4-5.

As Doe 1 concedes, on February 12, 2013, Doe 1 anonymously published on the website www.mungergames.net (“Munger Games”) an article entitled “Meet Harmeet,” which featured the Headshot Photograph at the top of the article. *See* Dkt. 45 (Doe 1 Answer), ¶15; *see also* Shoquist Decl., Ex. B. The caption below the Headshot Photograph stated “Harmeet Dhillon,” and the photograph was not altered in any way. Dhillon Decl., ¶8; Shoquist Decl., Ex. B. The “Meet Harmeet” article identified Ms. Dhillon as the chair of the San Francisco Republican Party and then-candidate for CRP Vice Chairman, and discussed Charles Munger, Jr.’s support of Dhillon within the CRP. *See* Shoquist Decl., Ex. B. The Headshot Photograph was used by Doe 1 without Ms. Dhillon’s authorization or a valid license, and Doe 1 does not contest otherwise. *See, e.g.*, Dhillon Decl., ¶9; Motion; Cigel Decl., ¶¶9-10.

On April 2, 2013, Plaintiff filed a complaint for statutory copyright infringement against anonymous Doe defendants in this Court, seeking not only monetary damages in connection with the uncontested copyright infringement, but also the preliminary and permanent injunctive relief to which she is entitled under the copyright laws and which is essential to ensure that Defendants cease from continuing their infringement of, or encouraging others to infringe upon, Ms. Dhillon’s intellectual property rights. *See* Dkt. 1. Concurrently with filing her Complaint, Ms. Dhillon sought leave to conduct limited discovery on third party New Dream Network, LLC, prior to a Rule 26(f) Conference, to ascertain Defendants’ identities and move her case

forward, and this Court granted her request. *See, e.g.*, Dkts. 2, 3, 8. Ms. Dhillon served a subpoena on New Dream Network, LLC, which properly issued out of the Central District of California. *See* Shoquist Decl., ¶2.

In September 2013, Defendant Doe 1 opened an action in the Central District of California to quash the subpoena to New Dream Network, LLC. Shoquist Decl., ¶3. Prior to filing the motion to quash, counsel for Doe 1 made no attempt to meet and confer with counsel for Ms. Dhillon, as required by the Local Rules of the Central District. *Id.* As Ms. Dhillon explained in her opposition to the motion to quash, that motion was procedurally barred, as a threshold matter. *Id.* The motion to quash was fully briefed by the parties and was set for hearing on November 26, 2013. *Id.*

Prior to the hearing on the motion to quash, on November 4, 2013, this Northern District of California Court entered an Order denying Ms. Dhillon's then-pending administrative motion for leave to take early discovery on third parties Google Inc. and Michael Schroder, in light of Doe 1's representation, in sur-reply briefing on the administrative motion filed on October 25, 2013, that 1) counsel for Doe 1 would accept service of process on behalf of Doe 1, and 2) Doe 1 had "immediate plans" to file a motion to dismiss and/or a motion for summary judgment on Ms. Dhillon's copyright infringement claim. *See* Dkt. 41; 42. The Order required Doe 1 to accept service of process and "to promptly file" this Motion, which was filed two months later.

Following the November 4th Order, which counsel for the Parties construed as indicating this Court's intent to rule upon all issues between the Parties, the Parties filed a stipulation in the Central District court stating that Ms. Dhillon would withdraw her pending Central District-issued subpoena without prejudice, and that Doe 1 would withdraw and dismiss his motion to quash that subpoena without prejudice. Shoquist Decl., ¶4. The Central District court subsequently closed the case. *Id.* As a result, all issues between Ms. Dhillon and Doe 1 are now pending before this Court.

III. THE FIRST AMENDMENT DOES NOT PROVIDE A LICENSE FOR COPYRIGHT INFRINGEMENT

While the First Amendment offers certain protections for anonymous speech, it is beyond dispute that these protections are not boundless. “Anonymous speech, like speech from identifiable sources, does not have absolute protection. “The First Amendment, for example, does not protect copyright infringement [and]...[p]arties may not use the First Amendment to encroach upon the intellectual property rights of others.” *Sony Music Entertainment Inc. v. Does 1-40*, 326 F.Supp.2d 556, 562-63 (S.D.N.Y. 2004); *see also Arista Records, LLC v. Doe 3*, 604 F.3d 110, 118 (2nd Cir. 2010); *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011); *Columbia Ins.Co. v. Seescandy.com*, 185 F.R.D. 573, 577 (N.D. Cal. 1999); *In re Subpoena Duces Tecum to America Online, Inc.*, No. 40570, 2000 WL 1210372 (Va.Cir.Ct. Jan. 31, 2000) (reversed on other grounds, *America Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350 (2001) (“[t]hose who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights”).

“The right to speak, whether anonymously or otherwise, is not unlimited... and the degree of scrutiny varies depending on the circumstances and the type of speech at issue.” *Anonymous Online Speakers, supra*, 661 F.3d at 1173. For instance, “commercial speech enjoys only limited First Amendment protection.” *Id.*; *see also Lefkoe v. Jos A. Bank Clothiers, Inc.*, 577 F.3d 240, 248-49 (4th Cir. 2009). In specific, the problem of the unknown defendant infringing copyrights has worsened with the growth of the Internet. *See, e.g., Columbia, supra*, 185 F.R.D. at 577 (“[w]ith the rise of the Internet has come the ability to commit certain tortious acts, such as defamation, copyright infringement, and trademark infringement, entirely on-line. The tortfeasor can act pseudonymously or anonymously and may give fictitious or incomplete identifying information”). This case deals precisely with the issue of an unknown defendant (or defendants) infringing a valid copyright, and no amount of eloquence regarding First Amendment principles grants Doe 1 a constitutional right to infringe.

IV. MS. DHILLON HAS MADE A PRIMA FACIE CLAIM OF COPYRIGHT INFRINGEMENT

Ms. Dhillon has made a concrete showing – which Doe 1 *does not and cannot contest* – that 1) Plaintiff owns the copyright to the Headshot Photograph and 2) that Doe 1 has copied the Headshot Photograph without Plaintiff’s authorization and has used it in the “Meet Harmeet” article. *See* Dkt. 45 (Doe 1 Answer), ¶15; Dhillon Decl. ¶3; Shoquist Decl., Ex. A. This showing constitutes a prima facie claim of copyright infringement. *See Sony Music, supra*, 325 F.Supp. at 567 (claim of copyright infringement consists of two elements“(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original”).

Doe 1 attempts to argue that a consideration of the fair use factors is required to make a prima facie copyright infringement claim. This argument has been considered and rejected in federal courts around the nation, including by the United States Supreme Court. It is well-established that the evaluation of the affirmative defense of fair use is highly fact-specific and must be evaluated on a case by case basis. *See, e.g., Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561 (1985) (“[t]he drafters [of 17 U.S.C. §107, defining fair use] resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as *an affirmative defense requiring a case-by-case analysis*”) (emphasis added); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 (1994); *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1239 (11th Cir. 2010) (holding that “binding Supreme Court authority requires us to treat fair use as an affirmative defense”). The Ninth Circuit has similarly confirmed that “fair use is an affirmative defense.” *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997); *see also Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007); *Fox Broad. Co., Inc. v. Dish Network L.L.C.*, 723 F.3d 1067, 1074 (9th Cir. 2013); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1170 (9th Cir. 2012). There can be no dispute on this point.

V. JUDGMENT ON THE PLEADINGS UNDER FRCP 12(c) AND SUMMARY JUDGMENT UNDER FRCP 56 ARE INAPPROPRIATE BECAUSE THE OPERATIVE FACTS PERTAINING TO DOE 1'S¹ AFFIRMATIVE DEFENSE OF FAIR USE ARE DISPUTED

As Ms. Dhillon's prima facie claim of copyright infringement cannot be contested, the success of Doe 1's Motion hinges on his ability to demonstrate a lack of any triable issues of material fact concerning his affirmative defense of fair use. "Fair use is a mixed question of law and fact," and a court can resolve the issue of fair use on a motion for summary judgment only when there are no genuine issues of material fact, or if, after resolving all issues in favor of the opposing party, a reasonable trier of fact can reach only one conclusion. *Leadsinger, Inc. v. BMG Music Pub.* 512 F.3d 522, 530 (9th Cir. 2008); *see also Hustler Magazine Inc. v. Moral Majority Inc.* 796 F.2d 1148, 1151 (9th Cir. 1986). Based on the evidence submitted by Ms. Dhillon in support of this opposition, a reasonable trier of fact could reach two different conclusions about whether Doe 1's infringement was "fair use," and thus the Court may not properly make a determination as a matter of law concerning whether the fair use doctrine applies, under either Rule 12(C) or Rule 56.

A. Judgment on the Pleadings Under FRCP 12(c) is Unwarranted

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed.R.Civ.P. 12(c). "Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir.1989). "For purposes of the motion, the allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false." *Id.*; *see also Savage v. Council On American-Islamic Relations, Inc.*, 2008 WL 2951281 (N.D. Cal. 2008). "[D]ocuments specifically referred to in a complaint, though not physically attached to the pleading, may be considered where authenticity is unquestioned." *Id. Burnett v. Twentieth*

¹ Doe 1's Motion does not apply to other potential defendants, who are not before the Court.

1 *Century Fox Film Corp.*, 491 F.Supp.2d 962, 966 (C.D.Cal.2007).²

2 As discussed at length below, both the commercial nature of Doe 1's conduct and the
 3 effect of that conduct on the value of Ms. Dhillon's copyright are disputed by Ms. Dhillon,
 4 whose allegations must be accepted as true at this stage. Given that these issues are material to
 5 Doe 1's fair use defense, the issue of whether Doe 1's conduct is protected by the fair use
 6 doctrine cannot be decided on the pleadings under Rule 12(c). *See, e.g., Shepard v. Miler*, 2010
 7 WL 5205108 (E.D. Cal. 2010).

8 **B. Summary Judgment Under FRCP 56 is Unwarranted**

9 Summary judgment is appropriate where "there is no genuine issue as to any material
 10 fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).
 11 When a party with the ultimate burden of persuasion at trial as to a matter moves for summary
 12 judgment, it must demonstrate affirmatively by evidence each essential element of its claim or
 13 affirmative defense and must establish that there is no triable issue of fact as to each essential
 14 element such that a rational trier of fact could render a judgment in its favor. *Southern*
 15 *California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003). The moving party
 16 must meet the initial burden of producing evidence or showing an absence of evidence as well
 17 as the ultimate burden of persuasion. *Nissan Fire Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102
 18 (9th Cir.2000).

19 If, and only if, the moving party has sustained its initial burden, the nonmoving party
 20 must demonstrate there is a dispute as to material facts on the elements that the moving party
 21 has contested, including in the form of affidavits. *See Matsushita Elec. Indus. Co. v. Zenith*
 22 *Radio Corp.* 475 U.S. 574, 586 (1986); Fed.R.Civ.P. 56(e). In the endeavor to establish the
 23 existence of a factual dispute, the opposing party need not establish a material issue of fact
 24

25 ² In connection with the Motion, counsel for Doe 1 submits nine exhibits, only one of which (the
 26 "Meet Harmeet" article) is specifically referred to in the Complaint. *See* Cigel Decl. Exhs. A
 through I. Should the Court decide to proceed under a Rule 12(c) analysis, none of the remaining
 exhibits submitted by Doe 1 should properly be considered. *See Burnett, supra.*

conclusively in its favor; rather, it is sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir.1987).

The opposing party’s evidence is to be believed, and all reasonable inferences that may be drawn from the facts before the court must be drawn in favor of the opposing party. *Matsushita, supra*, 475 U.S. at 587; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Inferences may be drawn from a nonmoving party’s direct and circumstantial evidence to establish a genuine issue of material fact so long as such evidence was of sufficient “quantum or quality.” *Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1222 (9th Cir. 1995).

The direct and circumstantial evidence submitted by Ms. Dhillon, as well as the inferences to be drawn from that evidence, clearly demonstrate that there are disputed material facts pertaining to Doe 1’s affirmative defense of fair use. The sole “evidence” submitted by Doe 1 to demonstrate the absence of disputed material facts consists of legal argument and self-serving statements set forth in a declaration by Doe 1’s counsel, which statements lack foundation and are entitled to no weight.³ *See* Evidentiary Objections to Cigel Decl., *infra*. Given Doe 1’s failure to sustain its initial burden, the evidence set forth by Ms. Dhillon, and the Court’s obligation to view all inferences to be drawn from the underlying evidence in Ms. Dhillon’s favor, summary judgment is inappropriate.

³ Doe 1 is precluded from presenting new evidence in support of his Motion on reply. *See, e.g., U.S. ex rel. Giles v. Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000) (“It is improper for a moving party to introduce new facts or different legal arguments in the reply brief than those presented in the moving papers”); *State of Nev. v. Watkins*, 914 F.2d 1545, 1560 (9th Cir.1990) (“[Parties] cannot raise a new issue for the first time in their reply briefs” (citations omitted)); *Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir.1996) (“Issues raised for the first time in the reply brief are waived”).

V. DOE 1 CANNOT SHOW, AS A MATTER OF LAW, THAT THE FAIR USE FACTORS WEIGH IN FAVOR OF GRANTING JUDGMENT ON THE PLEADINGS

In determining whether the use made of a work constitutes fair use, the court considers:

(1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) The nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) The effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. §107. Doe 1 has failed to carry his affirmative burden of showing the absence of any triable issue of fact as to each essential element of his affirmative defense of fair use.

A. Purpose and Character of the Use

1. Commercial Character of the Use

The first fair use factor includes an inquiry into whether the use was for profit, and whether and to what extent the new work is transformative. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). If a defendant's use of the copyrighted item is commercial in nature, that fact weighs against a finding of fair use. *Harper & Row, supra*, 471 U.S. at 562. "Fair use presupposes good faith and fair dealing, and one pertinent consideration is whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Arista, supra*, 604 F.110 at 124; *citing Harper & Row, supra*, 471 U.S. at 560. The Supreme Court has recognized that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (internal citations omitted); *Leadsinger, Inc. v. BMG Music Pub.* (9th Cir. 2008) 512 F.3d 522, 530

Doe 1's analysis of the first factor of fair use conspicuously omits any discussion of the commercial nature of the use. *See* Motion, pp. 15-19. Rather, in a short paragraph buried at the end of his brief, Doe 1 states that "there is no allegation or evidence that mungergames.net generated any income from the posting of the headshot...the blog is entirely non-

1 commercial...[t]he site does not sell anything whatsoever and there is no option on the site to
2 provide money.” Motion, 22:6-11. This argument is fatally deficient on numerous grounds.

3 First, Doe 1 submits no admissible evidence in support of his self-serving statements that
4 mungergames.net does not sell anything or solicit donations from viewers. While Doe 1’s
5 counsel submits a declaration with these assertions, he provides no foundation and demonstrates
6 no personal knowledge of the facts asserted, and thus his testimony must be given no weight, and
7 certainly does not overcome the presumption that a commercial use of a copyrighted material is
8 an unfair exploitation of copyright. *See* Evidentiary Objections, *infra*; *see also* Fed.R.Civ.P.
9 56(e) (affidavits shall be based on personal knowledge, set forth such facts as would be
10 admissible in evidence, and show affirmatively that the affiant is competent to testify to the
11 matters stated therein); *Sony Corp.*, *supra*, 464 U.S. at 451. Legal argument and rhetoric are not
12 evidence, and do not create issues of fact. *See, e.g., British Airways Bd. v. Boeing Co.*, 585 F.2d
13 946, 952 (9th Cir.1978). Nor do baseless declarations by counsel without personal knowledge.

14 Second, simply claiming that *mungergames.net* does not charge a fee to viewers does not
15 establish that *Doe 1*, as author and/or publisher of the Meet Harmeet article, did not derive a
16 commercial benefit therefrom. Indeed, the California Fair Political Practices Commisison
17 (“FPPC”) has recognized that campaign committees frequently pay authors to post “favorable or
18 unfavorable” political content on blogs, social media or online videos, and now requires
19 reporting of such payments, as well as the name of the website where the content appears, on
20 committee finance statements.. *See, e.g., Shoquist Decl.*, Ex. C (discussing proposal enacted in
21 September 2013, which regulates online political communication).

22 Further, Doe 1’s moving papers do not address the probability that *other individuals* were
23 involved with authoring and/or publishing the Meet Harmeet article, and that those individuals
24 may have profited in connection with this involvement. The Answer filed in this matter by Doe 1
25 admits that “an article entitled ‘Meet Harmeet’ was anonymously published on the website
26 www.mungergames.net on February 12, 2013, and that Doe 1 *had some role* in publishing that

article” (Dkt. 45, ¶15, emphasis added), but does not explain the roles any other Doe defendants shared in the publication and redistribution of the article. While purporting, without basis, to speak on behalf of all those connected with mungergames.net, Doe 1 fails to state that he, individually, or any other Doe defendant derived no commercial benefit from his or her infringing use of the Headshot Photograph. Based on Doe 1’s own pleadings, there may be not only one, but rather several individuals commercially benefiting from the theft at issue, and Ms. Dhillon should not be deprived of the opportunity to pursue her copyright claim against *all Doe defendants* while they hide beyond a shield of anonymity.

Doe 1 submits no admissible evidence whatsoever showing that he (or others) is not profiting from his unauthorized use of Ms. Dhillon’s Headshot Photograph, despite having *three separate opportunities* to do so, in two different district courts, and two of which opportunities were initiated by him. Shoquist Decl., ¶8. It is Doe 1 – not Ms. Dhillon – who bears the burden of demonstrating affirmatively by evidence each essential element of his affirmative defense of fair use. *Southern California Gas Co., supra*, 336 F.3d at 888. Doe 1’s repeated failure to provide evidence of a lack of commercial benefit is, by itself, compelling evidence that raises a material factual dispute regarding whether Doe 1 – and/or other – have commercially benefitted from the exploitation of Ms. Dhillon’s intellectual property.⁴

Further evidence of the disputed commercial benefit is clear from the State of California’s recognition that political bloggers are often paid directly from outside sources rather than the blogs on which they post content. This fact is confirmed by Ms. Dhillon’s evidence, which shows that bloggers who author successful “attack” articles criticizing political candidates can and do command higher compensation, and that campaign committees and others pay bloggers more highly to post stories if the blog on which the content is posted can show that it

⁴ Even had Doe 1 submitted evidence regarding the commercial element of fair use – which he has not and which he is precluded from doing on reply – such evidence would “raise[] questions of credibility and plausibility that cannot be resolved while Doe 3 avoids suit by hiding behind a shield of anonymity.” *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 124 (2d Cir. 2010).

has a strong following. Declaration of Aaron F. Park (“Park Decl.”), ¶5. The use of a candidate’s or politician’s photograph in conjunction with a blog or email significantly increases the likelihood that the post or email will be read, which yields a higher “conversion” rate and therefore more return on the investment of the posting party. Park Decl., ¶4. It is therefore likely that Doe 1’s admitted use of the Headshot Photograph increased traffic to mungergames.net and caused either Doe 1, or mungergames.net, or both, to enjoy a direct commercial benefit from that increase in traffic, as well as an increase in Doe 1’s ability to demand higher compensation for future attack articles. Park Decl., ¶6.

Third, evidence submitted by Ms. Dhillon (as well as the lack of admissible evidence submitted by Doe 1) raises a triable question as to whether the mungergames.net blog itself is commercial. Political blogs that are free to users or readers are often funded by and draw revenue from sources outside of user subscriptions or donation solicitations. Park Decl., ¶7. For example, websites such as consumerwatchdog.org, which characterizes itself as “a nonprofit organization dedicated to providing an effective voice for taxpayers and consumers in an era when special interests dominate public discourse, government and politics,” (<http://www.consumerwatchdog.org/about>), generate revenue from its website, including by selling access to its website to the clients it consults. Park Decl., ¶7. Other blog websites that are free to users – such as Wordpress.com, Blogger.com, or Flashreport.org – generate revenue in connection with the “pay per click” advertisements that are placed on the free blogs. Park Decl., ¶7.

It is beyond dispute that the mungergames.net site has been used for a commercial purpose on at least one occasion. For instance, last October, mungergames.net drove viewer traffic to Flashreport.org, a political blog founded by Jon Fleishman, by posting two hyperlinks to Flashreport.org in connection with an article reviewing a column written by Fleishman, which attacked Ms. Dhillon for filing this lawsuit. *See* Shoquist Decl., ¶9, Exhs. E and F; Park Decl., ¶9. The mungergames.net article copied large excerpts from the Fleishman column and concluded with the statement “You can read the rest of Fleischman’s on-target column **here**

[hyperlink].”⁵ See Shoquist Decl., ¶9, Exhs. E and F. Flashreport.org is a clearly commercial site, rife with advertisements, including several stating “Your Ad Can Be Here!” See Shoquist Decl., ¶10, Ex. F. The increased traffic flow to Flashreport.org caused by mungergames.net’s decision to drive its readers there increased the commercial value of the advertisements posted on Flashreport.org, and thus the profit enjoyed by Flashreport.org. Park Decl., ¶9. Doe 1 himself has previously admitted that the “combined viewership” of mungergames.net, Flashreport.org and a third source ranks in the “hundreds of thousands of Californians.” See Dkt. 30 (Doe 1 and Michael J. Schroder’s Opposition to Plaintiff’s Administrative Motion for Leave to Take Limited Discovery), p.4. Directing a substantial part of that readership to a commercial website has a commercial benefit, and Doe 1 has submitted no evidence putting to rest the issue of whether any part of this commercial benefit was shared with Doe 1, other does, and/or mungergames.net.

Anonymously-authored articles are one of the tools that political professionals use to drive traffic to their business, and many seemingly-political blogs are actually generating a profit from the amount of traffic they generate from posted content. Park Decl., ¶8. Information gathered in anonymously-authored blogs can be valuable to political professionals and candidates, and can and is often sold. Park Decl., ¶8. If a blog seeks to influence the contributing patterns of contributors, it is likely that its authors and/or publishers have a commercial interest in the results of those patterns. Park Decl., ¶8.

The mungergames.net blog explicitly operates in an attempt to influence campaign contributions to Republican candidates, including the main subject of the blog’s criticism, Republican Charles Munger Jr. Park Decl., ¶9. The blog states that “We are very tough critics of Charles Munger Jr., but we freely acknowledge that *his wealth can be put to constructive use on*

⁵ Flashreport.org has similarly included hyperlinks driving viewer traffic to mungergames.net. In fact, shortly after mungergames.net was first created, Fleishman wrote an article praising the “sharp witted authors of The Munger Games” (despite Fleishman’s claim, in that same article, that he became aware of mungergames.net through an “anonymous e-mail”), and drove traffic directly to the mungergames.net website through a hyperlink posted on Flashreport.org. See Shoquist Decl., ¶10, Ex. G.

1 behalf of Republicans...as long as his focus is helping Republicans beat Democrats, and not
 2 other Republicans.” Shoquist Decl., Ex. H (emphasis added). The blog addresses “...activists,
 3 regulars, volunteers, donors, party leaders, candidates and legislators sidling up to Munger’s
 4 wallet...” Shoquist Decl., Ex. I (emphasis added). Moreover, Doe 1 has adduced no evidence
 5 showing that mungergames.net – while purporting to be a purely non-commercial and political
 6 blog – does not actually generate profit in connection with the amount of online traffic it
 7 generates from the anonymous articles it posts.

8 A review of mungergames.net’s content and character indicates that mungergames.net is
 9 an attempt by a select group of Republican consultants in the Orange County region to eliminate
 10 competitive Republican versus Republican races in that area. Park Decl., ¶9; Shoquist Decl., Ex.
 11 H (January 10, 2014 posting on mungergames.net, stating “If we were to be so bold as to suggest
 12 a New Year’s resolution for Munger, it would be this: Don’t spend a dime on any Republican
 13 versus Republican contests in the November general election”). If achieved, this action would
 14 directly benefit these consultants due to a combination of victory bonuses and other monetary
 15 incentives. Park Decl., ¶9. The candidates in the Orange County races are advertisers on
 16 Flashreport.org. Park Decl., ¶9. Accordingly, it is likely that mungergames.net, Doe 1, and
 17 websites that link to mungergames.net, all derived commercial benefit from the use of Doe 1’s
 18 use of the Headshot Photograph on the blog. Park Decl., ¶10.

19 The evidence available to the Court, and the fact that Doe 1 has so completely and
 20 repeatedly failed to carry his burden on the commercial element of fair use, clearly show that
 21 there is a disputed issue of material fact concerning whether either Doe 1, mungergames.net
 22 and/or other Doe defendants “stand[] to profit from exploitation of the copyrighted material
 23 without paying the customary price.” *Arista, supra*, 604 F.110 at 124. This weighs against a
 24 finding of the first fair use factor.

25 2. Transformative Character of the Use

26 The second fair use factor is whether Doe 1’s unauthorized use of the Headshot

1 Photograph was transformative. “Although transformation is a key factor in fair use, whether a
 2 work is transformative is a often [sic] highly contentious topic.” *Seltzer v. Green Day, Inc.*, 725
 3 F.3d 1170, 1176 (9th Cir. 2013). The Ninth Circuit has warned against affording the
 4 transformative use factor too much deference in the fair use determination, and has very recently
 5 acknowledged that “[a] leading treatise on this topic has lamented the frequent misuse of the
 6 transformation test, complaining that it has become a conclusory label which is ‘all things to all
 7 people.’” *Id.* at 1176 (citing Melville B. Nimmer & David Nimmer, 4 Nimmer on Copyright §
 8 13.05 [A][1][b], 13–168–70 (2011) (internal quotation marks omitted).

9 “In the typical ‘non-transformative’ case, the use is one which makes no alteration to the
 10 *expressive content or message* of the original work.” *Selzer, supra*, 725 F.3d at 1177, 1181
 11 (holding that “transformation was far from obvious given [defendant rock band’s] only slight
 12 alterations to the original [illustration]”); *see, e.g., Monge, supra*, 688 F.3d at 1176 (magazine
 13 publication of photos of secret wedding of celebrity was not transformative because it did not
 14 “alter[] the first [work] with new expression, meaning or message”) (second alteration in
 15 original); *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 79 (2d Cir.1997) (use of a
 16 poster as decoration on a TV show not transformative because it was used for “precisely a central
 17 purpose for which it was created – to be decorative” and defendants had done nothing with the
 18 poster to add anything new).

19 A secondary use of a copyrighted work is transformative when the new work “adds
 20 something new, with a further purpose or different character, altering the first with new
 21 expression, meaning, or message.” *Campbell, supra*, 510 U.S. at 579. The Ninth Circuit has
 22 cautioned that “an infringer’s separate purpose, by itself, does not necessarily create new
 23 aesthetics or a new work that alters the first work with new expression, meaning or message,”
 24 and has held that “wholesale copying sprinkled with written commentary...[is] at best minimally
 25 transformative.” *Monge, supra*, 688 F.3d at 1176 (internal citations omitted). “A use is
 26 considered transformative only where a defendant changes a plaintiff’s copyrighted work or uses

1 the plaintiff's copyrighted work in a different context such that the plaintiff's work is
 2 transformed into a new creation." *Wall Data Inc. v. Los Angeles County Sheriff's Dept.*, 447 F.3d
 3 769, 778 (9th Cir. 2006).

4 As Ms. Dhillon has established, she created and uses the Headshot Photograph for the
 5 purpose of identifying herself as "Harmeet Dhillon," including in connection with political
 6 endeavors. Dhillon Decl., ¶4. This is the *exact same use* that Doe 1 and mungergames.net made
 7 of the Headshot Photograph. In attempting to quash the subpoena to New Dream Network in the
 8 Central District court, Doe 1 explicitly admitted that "the purpose of mungergames.net's use of
 9 the photograph was to allow readers of mungergames.net to identify Ms. Dhillon." Shoquist
 10 Decl., Ex. D (Motion to Quash, 21:12-14). Recognizing that this admission dooms his
 11 transformative use analysis, Doe 1 has been careful to ensure that he does not repeat the
 12 admission in the instant Motion, although the admission stands, and is conclusive.

13 Doe 1 concedes that he did not make a single alteration to the Headshot Photograph. This
 14 falls short of the clear requirement that Doe 1's use adds something new or alters the primary use
 15 with a new expression, meaning or message. This case is highly distinguishable from *Sedgwick*
 16 *Claims Mgmt. Servs., Inc. v. Delsman*, 2009 WL 2157573, at *5 (N.D. Cal. 2009), where images
 17 originally used for promotional reasons were superimposed on postcards that mimicked
 18 "WANTED" posters, and were given captions in large fonts stating "WANTED FOR HUMAN
 19 RIGHTS VIOLATIONS," with accompanying text urging the public to report plaintiffs'
 20 misdeeds to public agencies.

21 Here, Doe 1's "expression, meaning or message" in placing the photograph alongside the
 22 "Meet Harmeet" article did not deviate in any way from Plaintiff's original use, and the fact that
 23 the text adjacent to Doe 1's wholesale copying of the Headshot Photograph contains some
 24 critique of Plaintiff does not alter this conclusion. *See, e.g., Monge, supra*, 688 F.3d at 1176.
 25 This is not a case where, for example, "photographs were originally intended to appear in
 26 modeling portfolios, not in the newspaper" (Motion, 18:20-24, *citing Nunez v. Caribbean Intern.*

1 *News Corp.*, 235 F.3d 18, 22 (1st Cir. 2000) – rather, Ms. Dhillon’s motivation for creating the
 2 Headshot Photograph was to use it to identify herself, and that is the same purpose that Doe 1
 3 has used it for, without alteration. Dhillon Decl., ¶2.

4 As Doe 1 has utterly failed to a) meet (or even to try to meet) his burden of showing that
 5 he derives no commercial benefit from the posting of the “Meet Harmeet” article, or b) meet his
 6 burden of showing that use of the Headshot Photograph was transformative, the first factor
 7 weighs strongly against a finding of fair use.

8 **B. The Nature of the Copyrighted Work.**

9 The second fair use factor is the nature of the copyrighted work. 17 U.S.C. §107(2).
 10 Under this second factor, courts evaluate whether the work is (1) creative; and (2) unpublished.
 11 *Harper & Row, supra*, 471 U.S. at 563-64. “Courts have recognized repeatedly that the creative
 12 decisions involved in producing a photograph may render it sufficiently original to be
 13 copyrightable and have carefully delineated selection of subject, posture, background, lighting,
 14 and perhaps even perspective alone as protectable elements of a photographer’s work.” *Los*
 15 *Angeles News Serv. v. Tullo*, 973 F.2d 791, 794 (9th Cir.1992).

16 The Headshot Photograph is a result of the type of creative decisions that courts have
 17 found to weigh against a finding of fair use. The author of the work – professional photographer
 18 Colin Hussey – used care and technique in selecting and employing creative elements that
 19 would result in a Headshot Photograph that achieved the type of message Plaintiff was striving
 20 for, including the proper venue and background; the time of day chosen to achieve the best
 21 lighting; Plaintiff’s body and head placement; and the framing of the shot. *See* Declaration of
 22 Colin Hussey In Support of Opposition to Motion, ¶¶4-10. Mr. Hussey also creatively edited
 23 and retouched the Headshot Photograph to achieve the desired result. *Id.*, ¶11. These creative
 24 elements weigh heavily against a finding of fair use.

25 In attempt to refute Ms. Dhillon’s valid argument that the Headshot Photograph is
 26 “creative,” Doe 1 cites the First Circuit case of *Nunez v. Caribbean Intern. News Corp.*, 235

1 F.3d 18, 22 (1st Cir. 2000), in which the court considered modeling photographs that had been
 2 used by a defendant in a newspaper article. The First Circuit agreed with the district court's
 3 finding that the "pictures could be categorized as either factual or creative," and held that
 4 "[g]iven the difficulty of characterizing the 'nature' of the photographs, we find that the impact
 5 of their creativity on the fair use finding is neutral." *Nunez, supra*, 235 F.3d at 23. Even if this
 6 court were to depart from established Ninth Circuit precedent (under which Ms. Dhillon
 7 demonstrates the "creative" nature of her work) in favor of First Circuit analysis and find that
 8 the photograph of Ms. Dhillon is not sufficiently creative, this aspect of the fair use analysis has
 9 nothing more than a neutral impact.

10 Doe 1 also misleads the Court with his allegation that Ms. Dhillon has "extensively
 11 published and released her publicity headshot photo to the general public over the course of the
 12 past several years." Motion, 19:16-17. In fact – and as Ms. Dhillon has stressed repeatedly in
 13 prior declarations – before Doe 1's infringement, all publication of the Headshot Photograph
 14 was made only with Ms. Dhillon's express authorization, and only to a highly select and
 15 restricted few individuals and entities, upon their specific request for her permission – not, as
 16 Doe 1 claims, to the "general public." Dhillon Decl., ¶4. Doe 1's intentional misconduct has
 17 deprived Ms. Dhillon of control over the publication of her copyrighted work, and this
 18 consideration should also weigh against a finding of fair use. *See, e.g., Harper & Row, supra*,
 19 471 U.S. at 560 ("Fair use presupposes good faith and fair dealing").

20 **C. The Amount and Substantiality of the Portion Used in Relation**
 21 **to the Copyrighted Work as a Whole**

22 The third fair use factor considers the amount and substantiality of the portion used by
 23 the defendant in relation to the copyrighted work as a whole. 17 U.S.C. §107(3). To the extent
 24 that Doe 1 copied "only as much of the photo as was necessary" (Motion, 21:4-5), this factor is
 25 neutral and does not weigh towards a finding of fair use. *See Kelly v. Arriba Soft Corp.*, (9th Cir.
 26 2003) 336 F.3d 811, 820-21.

D. The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work.

The fourth factor of fair use is the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. §107(4). The Ninth Circuit has stated that the relevant question is “whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original.” *Arriba Soft, supra*, 336 F.3d at 820.

Doe 1 misstates *Dash v. Mayweather*, 731 F.3d 303 (4th Cir. 2013) when he asserts that “[i]n order to survive a summary judgment motion, Dhillon bears the burden of providing evidence of actual economic harm.” Motion, 21:10-11. Doe 1 has the burden of first proving a lack of actual economic harm before any burden shifts to Ms. Dhillon. Doe 1 has failed to meet this burden. Moreover, *Dash* did not concern a fair use analysis, and the sole issue before the court was whether to uphold the district court’s grant of summary judgment in favor of a defendant on the issue of plaintiff’s entitlement to actual and profit damages. *See Dash, supra*, 731 F.3d at 313 (holding that “[i]n the summary judgment context, *once a defendant has properly supported his claim that there are no actual damages resulting from infringement*, the plaintiff must respond with nonspeculative evidence that such damages do, in fact, exist.” (emphasis added)).

Doe 1 utterly fails to meet his burden. He cites no evidence in support of his assertion that “[t]here simply is no market for Dhillon’s widely-used and now out-of-date publicity headshot photograph.” Motion, 22:12-13. The Ninth Circuit has held that a defendant’s failure to adduce evidence beyond merely “confining [himself] to uncontroverted submissions that there was no likely effect on the market for the original” disentitled the defendant from successfully asserting a fair use defense, as it should in this case. *Dr. Seuss, supra*, 109 F.3d at 1403.

Doe 1’s reliance on *Dash* is misguided for an additional reason. In concluding that plaintiff was not entitled to any relief in the copyright action, the *Dash* court held that it did not need to address plaintiff’s claim for injunctive relief because defendant had agreed not to

1 continue the infringing conduct. *Dash, supra*, 731 F.3d at n.3. By contrast, Ms. Dhillon seeks
 2 injunctive relief in addition to monetary damages, on the grounds that if type of conduct
 3 exhibited by Doe 1 is allowed to continue, the market for photographs of Ms. Dhillon will be
 4 adversely affected because entities or individuals that wish to use copyrighted photographs of
 5 Plaintiff will not feel restrained from doing so, even without Plaintiff's authorization.

6 Although she is not obligated to do so, Ms. Dhillon submits evidence that clearly raises a
 7 disputed issue of material fact as to whether Doe 1's infringing conduct has negatively affected
 8 the potential market for and/or value of the Headshot Photograph. Ms. Dhillon has established
 9 that, since 2008 and until the infringing conduct by Doe 1, she consistently used the Headshot
 10 Photograph to identify herself, including in connection with her political endeavors. Dhillon
 11 Decl., ¶4.⁶ Ms. Dhillon has further established that, prior to Doe 1's infringing conduct, she was
 12 frequently approached by individuals and organizations for authorization to use the Headshot
 13 Photograph. Dhillon Decl., ¶5.

14 Since the infringement, Ms. Dhillon has not received any interest in using the Headshot
 15 Photograph, nor has she wanted to use or actually used the Headshot Photograph in her own
 16 endeavors, due to its now-negative association. Dhillon Decl., ¶¶6-7. This is not surprising, as
 17 the value of a headshot photograph decreases when it is used in a negative and/or unauthorized
 18 way, and such use can taint the entire "brand" of the person depicted in the photograph.
 19 Declaration of Tab Berg In Support of Opposition to Motion ("Berg Decl."), ¶3. For this reason,
 20 professional political figures zealously guard and protect the images they release to the public.
 21 Berg Decl. ¶4. In fact, companies exist whose entire purpose is to protect the value of a client's
 22 images online, including by patrolling the Internet to determine where a client's image is used
 23 negatively, and taking action to negate the harmful effects of that use. Berg Decl., ¶5.

24
 25 ⁶ The fact that the photograph is from 2008 has no relevance to its value, and both private
 26 individuals and political figures routinely use "old" headshot photographs in marketing efforts.
 Berg Decl., ¶8. In fact, it goes without saying that many prefer old headshots to current ones –
 the older the shot, the better.

Accordingly, the unauthorized use by Doe 1 of Ms. Dhillon's Headshot Photograph in a negative context clearly devalues the value and usefulness of the photograph to Ms. Dhillon, as well as its value and usefulness to others who may otherwise have sought to license its use. Berg Decl., ¶¶ 6-7. At the very least, Ms. Dhillon will have to pay for a new headshot because of the misuse of the Headshot Photograph.

Even were Ms. Dhillon unable to submit the above evidence, which clearly raises a disputed issue of material fact as to whether Doe 1's infringing conduct has affected the potential market and/or value for the Headshot Photograph, the fourth factor weighs against a finding of fair use. In *Los Angeles News Service v. Reuters Television Intern., Ltd.*, 149 F.3d 987, 994 (9th Cir. 1998), the Ninth Circuit held that even where a plaintiff opposing the fair use defense "could not prove loss of subsequent sales of the works, and hence actual adverse effect on the market for [the original work], defendants' actions should not go unpunished," as "[s]uch actions if permitted would result in a substantially adverse impact on the potential market for the original works." *Id.* at 994. Here, Ms. Dhillon has submitted evidence of damage, and Doe 1 has provided no evidence to refute Ms. Dhillon's showing – let alone evidence sufficient to quell any disputed factual issue – and is precluded from doing so on reply.

In summary, Doe 1 clearly fails to meet his burden of proof with regard to the first, second and fourth factors of the fair use defense, which weigh against a finding of fair use, and the third factor is neutral. As there are disputed material facts as to Doe 1's affirmative defense, judgment on the pleadings or summary judgment, in any form, is unwarranted and improper.

VI. AWARDING ATTORNEYS' FEES OR COSTS TO DOE 1 WOULD BE WHOLLY UNWARRANTED

As Doe 1 concedes, "[t]he most important factor in determining whether to award fees under the Copyright Act[] is whether an award will further the purposes of the Act – the primary objective of the Act being to encourage the production of original literary, artistic, and musical expression for the good of the public." Motion, 23:13-21, *citing Sofa Entm't, Inc. v.*

1 *Dodger Prods.*, 709 F.3d 1273, 1280 (9th Cir. 2013) (internal citations omitted). One way in
 2 which this objective is achieved is by discouraging infringement through the prosecution of
 3 colorable copyright claims. *See Fogerty v. Fantasy, Inc.* (1994) 510 U.S. 517, 526.

4 Attorney's fees are not automatically awarded to the prevailing party in a copyright
 5 infringement dispute, but rather, the recovery of fees is left to the court's discretion. *Id.* at 534;
 6 *Seltzer, supra*, 725 F.3d at 1180. "[A]ttorneys' fees to prevailing defendants [should] be
 7 awarded circumspectly to avoid chilling a copyright holder's incentive to sue on colorable
 8 claims," and "[p]revailing defendants are granted such fees only when the court finds plaintiff's
 9 suit to have been baseless, frivolous, unreasonable, or brought in bad faith." *Roth v. Pritikin*
 10 787 F.2d 54, 57 (2d Cir. 1986); *see also Bibbero Systems, Inc. v. Colwell Systems, Inc.*, 893
 11 F.2d 1104, 1108 (9th Cir. 1990) ("In order to receive attorney's fees on a claim of copyright
 12 infringement, a prevailing defendant must show that the action was frivolous or brought in bad
 13 faith"); *Jartech, Inc. v. Clancy*, 666 F.2d 403, 407 (9th Cir. 1982)

14 The Ninth Circuit has specifically addressed the question of whether the successful
 15 assertion of a fair use defense requires an award of attorneys' fees and has answered in the
 16 negative. In *Seltzer v. Green Day, Inc.*, the court reversed the district court's finding that
 17 Plaintiff's copyright infringement claim was objectively unreasonable – despite the fact that
 18 plaintiff had lost his claim of infringement at summary judgment and had only won one of the
 19 four fair use factors – and held that "the mere fact that [plaintiff] lost cannot establish his
 20 objective unreasonability." *Seltzer, supra*, 725 F.3d at 1181; *see also Jartech, supra*, 666 F.2d
 21 at 407 (merely proving a successful fair use defense is not sufficient to justify an award of
 22 attorneys' fees where claim is non-frivolous).

23 Courts deciding whether to award attorneys fees can look to five non-exclusive factors:
 24 (1) the degree of success obtained; (2) frivolousness; (3) motivation; (4) the objective
 25 unreasonableness of the losing party's factual and legal arguments; and (5) the need, in
 26 particular circumstances, to advance considerations of compensation and deterrence. *Seltzer*,

1 *supra*, 725 F.3d 1170, 1181. In the present case, all five factors concerning attorneys’ fee
2 awards weigh in favor of Ms. Dhillon.

3 Regarding the first factor, there cannot be any dispute that Ms. Dhillon has obtained a
4 high degree of success by asserting a colorable copyright claim, and as discussed above, the
5 first, second and fourth factors of fair use weigh in favor of Ms. Dhillon, with the third factor
6 being neutral. Similarly, regarding the fifth factor, there is no behavior for this Court to deter
7 because Ms. Dhillon has filed a meritorious, “colorable” claim against Doe defendants. *Fogerty*,
8 *supra*, 510 U.S. at 526.

9 Ms. Dhillon’s attempts to enforce her registered intellectual property plainly cannot be
10 said to be frivolous, objectively unreasonable, or improperly motivated. This case is highly
11 distinguishable from *AF Holdings LLC v. Navasca*, 2013 WL3815677 (N.D. Cal. 2013) cited by
12 Doe 1, in which this Court found plaintiff’s copyright infringement case to be frivolous and
13 objectively unreasonable where plaintiff “never presented any evidence (although it had the
14 opportunity to do so) to support its claim that it has standing to assert a claim for copyright
15 infringement.” *Id.* at 1. Indeed, in that case, the Court found that plaintiff’s standing argument
16 rested on a forged signature on an assignment agreement, and further found that plaintiff named
17 defendant as a party after an inadequate factual investigation. *Id.*

18 By contrast, Ms. Dhillon has not only set forth an irrefutable prima facie case of
19 copyright infringement, but she has explained under oath the damaging effects Doe 1’s
20 unauthorized use has had on her intellectual property, as well as the need for Doe 1 to be
21 enjoined from repeating his (and his associates’) misconduct in the future. Further, Ms. Dhillon
22 has gone to great lengths and has done ample due diligence in attempting to ascertain the correct
23 identity(ies) of the Doe defendants prior to involving them in this lawsuit, as Doe 1
24 acknowledges in his Motion. *See, e.g.*, Dhillon Decl., ¶¶10-12; Shoquist Decl., ¶2 Motion, pp.
25 4-5. Ms. Dhillon’s motivation for this legitimate lawsuit is proper. By contrast, it is Doe 1’s
26 baseless and biased musings over Ms. Dhillon’s incentives that are frivolous, unfounded and

improperly motivated. Awarding fees to Doe 1 under these circumstances would be illogical, implausible and without support, and would constitute an abuse of discretion subject to reversal on appeal. *See, e.g., Seltzer, supra*, 725 F.3d at 1180; *U.S. v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009).

VII. CONCLUSION

For the foregoing reasons, Ms. Dhillon respectfully requests that this Court deny Doe 1's Motion for Judgment on the Pleadings Pursuant to FRCP 12(c) or for Summary Judgment under FRCP 56, and also deny Doe 1's request for costs and attorneys' fees.

VIII. EVIDENTIARY OBJECTIONS TO THE DECLARATION OF RICK CIGEL

Material Objected To	Grounds for Objection
1. "The Munger Games is a wholly noncommercial blog..." Declaration of Rick A. Cigel ("Cigel Decl."), ¶3.	Lack of personal knowledge, lack of foundation. Fed. Rules Evid., rule 602. Mr. Cigel has established that his only connection to the Munger Games website is as an attorney for one anonymous participant in the blog. Cigel Decl., ¶2. Accordingly, he could not personally know if, or how, the Munger Games receives compensation for the management, contribution or maintenance of the website. Mr. Cigel fails to establish any basis on which he is qualified to comment on the business operations of the Munger Games website.
2. "The Munger Games website has absolutely no commercial elements." Cigel Decl., ¶4.	Lack of personal knowledge, lack of foundation. Fed. Rules Evid., rule 602. Mr. Cigel has established that his only connection to the Munger Games website is as an attorney for one anonymous participant in the blog. Cigel Decl., ¶2. Accordingly, he could not personally know whether the Munger Games has a commercial element. Mr. Cigel fails to establish any basis on which he is qualified to comment on the commercial elements, aspects or impact of the Munger Games website.

Date: January 28, 2014

DHILLON & SMITH LLP

By:

/s/ Krista L. Shoquist

HAROLD P. SMITH

KRISTA L. DHILLON

Attorneys for Plaintiff Harmeet K. Dhillon

Opposition to Doe 1's Motion for Judgment on the Pleadings or for Summary Judgment

DHILLON & SMITH LLP